

Constitutional Studies

Past Comprehensive Exam Questions

(Note: you may see duplicate questions)

Fall 2011

Constitutional Studies Comprehensive Exam and Reading List (Effective Fall, 2011)

The Constitutional Studies Comp is an open-book, written exam, to be completed and submitted no later than 8 hours after the exam is emailed to the student. The 8 hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies only for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. Failure to meet the deadline means failure on the exam.

The exam will consist of three questions. No answer can be longer than 1,700 words. Answers must be the student's own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Exam answers must be doubled-spaced.

The field of Constitutional Studies is divided into six subfields: (1) American Constitutional Law and Development; (2) Comparative Constitutional Systems and Law; (3) International Courts and Human Rights; (4) Judicial Politics and Institutional Behavior; (5) Legal and Constitutional Philosophy; and (6) Constitutional Interpretation. Questions for any one comp will reflect those subfields from which graduate courses or graduate-eligible courses have been offered the preceding three semesters. If, for example, no course in constitutional interpretation has been offered the preceding three semesters, then no question from that subfield will appear on a given comp. Students should note carefully that this policy does not excuse the student from his or her responsibility for the reading list in each subfield beyond what may be offered in courses over the preceding three semesters. The faculty recognizes its obligation to teach courses in the comp areas, but graduate students will be treated as emerging professionals with independent responsibilities. Information on the readings to be emphasized and the subfields represented in a given comp will be available from the Constitutional Studies field chair.

Students must answer one option in each of two subfields: *Either* (a) American Constitutional Law and Development *or* (b) Legal and Constitutional Philosophy, *and* (c) Judicial Politics and Institutional Behavior. The student's third answer must be taken from one of the remaining four subfields, leaving a distribution of three subfields for the comp. The specific distribution of required and elective options may be adjusted to reflect course offerings over the preceding three semesters. If, for example, no course has been offered in Judicial Politics and Institutional Behavior over the preceding three semesters, then no question from that subfield will appear on the exam, and the comp mandate relative to that subfield won't apply. In this case the student would answer questions from one required field and two elective fields.

The field faculty will grade the comps within three weeks of completion, and grades will reflect the judgment of the field faculty as a whole.

Constitutional Studies Subfields and Courses, with Selected Readings

(1) American Constitutional Law and Development

Courses:

The American Founding

American Constitutional History

The Constitution and Public Policy

Civil Rights and Civil Liberties

Constitutional Institutions (seminars/lecture courses in federalism, Congress and the Court, Judicial Review, etc.)

The Constitution and the Civil War

Big Government and the Constitution

Religion and the Constitution.

The American Judicial System

Representative Readings:

Landmark Decisions of the U.S. Supreme Court

Alexander Hamilton, James Madison, and John Jay, *The Federalist*

James Madison, *Notes of Debates in the Federal Convention of 1787*

Henry Abraham, *The Judicial Process*

Akhil Reed Amar, *America's Constitution: A Biography*

Alexander Bickel, *The Least Dangerous Branch*

Harry Jaffa, *Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates*

Ronald Kahn and Ken Kersch, eds, *The Supreme Court and American Political Development*

Martin Diamond, *The Founding of the Democratic Republic*

Walter Berns, *The First Amendment and the Future of American Democracy*

Sanford Levinson, *America's Undemocratic Constitution*

Philip Munoz, *God and the Founders: Madison, Washington, and Jefferson*

Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution.*

Bernard Siegan, *Economic Liberties and the Constitution*

Michael Zuckert, *The Natural Rights Republic*

Herbert Storing, "The Problem of Big Government," and *What the Antifederalists Were For*

(2) Comparative Constitutional Systems and Law

Courses:

Comparative Constitutional Law

Comparative Judicial Systems

Representative Readings

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the new Constitutionalism*

Gary Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*

Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*

Walter Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*

(3) International Judicial Systems and Human Rights

Courses:

International Courts

International Human Rights

Readings:

Michael Haas, *International Human Rights: A Comprehensive Introduction*

Eric Posner, *The Perils of Global Legalism*

(4) Judicial Politics and Institutional Behavior

Courses:

Judicial Power in Institutional Context

Public Opinion and the Judiciary

Judicial Strategy and Voting Behavior

Judicial Power and Social Change

Representative Readings:

Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior*

Cornell Clayton and Howard Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches*

Robert Dahl, "Decision-Making in a Democracy: the Supreme Court as a National Policy-Maker".

Lee Epstein and Jack Knight, *The Choices Judges Make*

Lee Epstein and Jeffrey Segal, *Advice and Consent: The Politics of Judicial Appointments*

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*

Walter Murphy, *Elements of Judicial Strategy*

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*

Jeffrey Segal and Harold Spaeth, *The Attitudinal Model Revisited*

Martin Shapiro, *Law and Politics in the Supreme Court*

Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History*

(5) Legal and Constitutional Philosophy

Courses

The Nature of Law

The Philosophy of the American Founding

Varieties of Liberal Constitutionalism (Positive, Negative, and Procedural Constitutionalism)

Liberal Constitutionalism and its Critics (Burke, Schmidt, Strauss, Sandel, etc.)

The Rule of Law and Emergency Power

The Constitutional Thought of American Statesmen

Models of Constitutional Leadership and Responsibility

Constitutionalism: Ancient and Modern

The Logical Structure of Constitutional Rights, Powers, and Institutions

Metaethics and Constitutional Thought

Liberal Constitutionalism and the Welfare State

Constitutionalism, Justice, and Property

Legal Reasoning

Legal Research

Representative Readings:

Bruce Ackerman, *We the People: Foundations*

Sotirios Barber, *Welfare and the Constitution*

H.L.A. Hart, *The Concept of Law*

Ronald Dworkin, *Justice for Hedgehogs*

John Hart Ely, *Democracy and Distrust*

Clement Fatovic, *Outside the Law: Emergency and Executive Power*

Charles McIlwain, *Constitutionalism: Ancient and Modern*

Richard Posner, *How Judges Think*

Michael S. Moore, "Law as a Functional Kind"

Neil MacCormick, *Legal Reasoning and legal Theory*

Joseph Raz, *The Authority of Law*

Michael Sandel, *Democracy's Discontent*

Amy Sloan, *Basic Legal Research: Tools and Strategies*

Michael Zuckert, *Launching Liberalism*

(6) Theories of Interpretation

Courses:

Constitutional Interpretation

Textual Interpretation: Legal, Literary, and Scriptural

Representative Readings:

Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions*

Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*

John Hart Ely, *Democracy and Distrust*

Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*

Stanley Fish, *Is There a Text in This class? The Authority of Interpretive Communities*

Michael S. Moore, "A Natural Law Theory of Interpretation"

Gary McDowell, *The Language of the Law and the Foundations of American Constitutionalism*

Leo Strauss, "On the Interpretation of Genesis"

Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*

January 2012

Ph.D. Comprehensive Exam in Constitutional Studies, January 21, 2012

In 3 essays of no more than 1,700 words each, answer three of the following questions, choosing at least one question from Part I and one question from Part II. You may elect to write your third essay on a question from Part III or on another question from either Part I or Part II.

I.

A. Compare and critically assess the legal philosophies of Thomas Aquinas, H. L. A. Hart, and John Finnis, focusing on one of the following two themes: (1) the nature (or concept) of law; (2) the existence, character, and import of natural law.

B. Distinguish “abstract originalism” from “concrete originalism,” name theorists associated with each, and show how these understandings of “originalism” reflect different theories of (1) what legal-moral words like “liberty” refer to and (2) the American Constitution’s basic normative character (i.e., whether the American Constitution is (a) a contract among entities with different interests or (b) a charter for pursuing public goods like national security and the general welfare).

C. According to Robert Dahl and some others, many of the chief features of the Constitution (e.g., bicameralism, separation of powers, federalism, the Electoral College, the scheme of representation) were placed into the constitution in order to thwart democratic majorities. What do you think of Dahl’s claim? On the basis of your knowledge of the American founding how would you defend or critique Dahl’s claim?

D. Compare and contrast the place of the Founders and the Founders’ political and constitutional theory in the political thought of Lincoln, on the one hand, and of two Progressives (e.g., Croly, Wilson, F.D. Roosevelt, LBJ, Brennan) on the other.

II.

A. Has the American Supreme Court articulated a clear, consistent, and coherent Establishment Clause jurisprudence? Your answer should include a discussion of at least three First Amendment Religion Clause cases.

B. Citing the appropriate cases and the voting records of the Supreme Court’s current members, defend your prediction of how the court will decide whether same-sex couples have a constitutional right to marry.

C. Citing the appropriate cases and the voting records of the Supreme Court’s current members, defend your prediction of how the Court will decide the “individual mandate” provision of the Affordable care Act of 2010 (“Obamacare”).

III.

A. What are American scholars doing when they “compare” the decisions of the U.S. Supreme Court with the decisions or opinions of foreign constitutional courts? In short, why do they read and analyze the constitutional opinions of foreign courts of judicial review? And what do they expect to learn or take away from this enterprise?

B. A committee of the House of Representatives of the U.S. Congress recently held hearings on a bill providing that U.S. courts “may not rely upon” laws, rules, or judicial decisions of foreign countries in deciding constitutional cases. Give a detailed and critical response to this proposal.

May 2012

Con studies comp 5/23/12

Con Studies Comp 5/12

Answer one question from each of the following three subfields

Philosophy of Law and Constitutional Interpretation

1. Compare and contrast the place of the Founders and the Founders' political and constitutional theory in the political thought of Lincoln, on the one hand, and of two Progressives (e.g., Croly, Wilson, F.D. Roosevelt, LBJ, Brennan) on the other.
2. The 100th anniversary of Charles Beard's *An Economic Interpretation of the Constitution* is soon to come. It is a good time to assess his thesis that the Constitution was written to protect property and stymie democracy, with institutions like federalism, separation of powers, and the extended republic meant to prevent or nullify majorities in the interest of the wealthy.

On the basis of your study of the founding, what ought to be said about Beard's thesis?

Comparative Constitutional Systems and Law

1. "Some Supreme Court justices sternly *resist* the use of foreign constitutional law as a guide to interpreting the U.S. Constitution. Other justices just as sternly *engage* the decisions and reasoning of foreign constitutional courts in deciding cases arising under the Constitution. Under what circumstances would it be appropriate for a justice to adopt a posture of resistance to the use of foreign law in American constitutional decision-making? Under what circumstances, if any, would it be appropriate to adopt a posture of engagement?"
2. Judicial review was once regarded as a unique feature of the American governmental system. Since the end of World War II, however, many of the world's advanced democracies have created courts of judicial review modeled after the U.S. Supreme Court. What accounts for this remarkable postwar constitutional development around the world?

American Constitutional Law and Judicial Politics

1. Explain the following statement as fully as you can, taking care to discuss (1) each of the three cases, (2) the meaning of "departmentalism," and (3) the reason conservative justices give for denying that they are judicial activists.
 - a. "Whatever hope "departmentalism" might have derived from *Katzenbach v. Morgan* (1966) evaporated with the Supreme Court's decision in *Boerne v. Flores* (1997). Opponents of *Boerne* and other landmarks of the Federalism Revolution launched by the Con studies comp 5/23/12

Rehnquist Court in *U.S. v. Lopez* (1995) accuse the conservative justices of „judicial activism.“ But they deny the charge.”

Dissenting in *Planned Parenthood v. Casey* (1992) Chief Justice Rehnquist said the majority had left *Roe v. Wade* “a mere façade.” What subsequent Supreme Court decisions tend to (1) confirm and (2) disconfirm Rehnquist's view of what *Casey* accomplished?

September 2012

Constitutional Studies Comp, 9/29/12

Subfield 1: Am Constitutional Law & Judicial Politics: Answer one of the following.

A. Describe how judicial doctrine *from* *Brown v. Bd. of Ed* (1954), *through* *Swann v. Charlotte-Mecklenburg* (1971) and *Milliken v. Bradley* (1974), *to* *Parents Involved v. Seattle* (2007) evolved from a concern for equal educational opportunity to an insistence that state governments avoid racial classifications, invidious or benign.

(2) Explain how this development reflects two different understandings of the functions of constitutional government, namely, an “educative function” and a “coordinating function.” You must answer both parts of this question; no partial credit.

B. Has the American Supreme Court articulated a clear, consistent, and coherent Free Exercise Clause jurisprudence? Your answer should include a discussion of at least three First Amendment Religion Clause cases.

Subfield 2: Philosophy of Law and Constitutional Interpretation: Answer one of the following.

A. Illustrate the meaning of the following statement by discussing the differences between the Supreme Court’s opinions in *Plessy v. Ferguson* (1896) and *Brown v. Bd of Ed* (1954).

“To rely on judicial precedents for determining what the Constitution means is inevitably to falsify the facts of life or to imagine a world ‘for constitutional purposes’ that conflicts with the world in which we actually live.”

B. Thomas Aquinas and John Finnis offer two theories, arguably not identical, of natural law and its relationship to positive law. Oliver Wendell Holmes and H.L.A. Hart offer critiques of natural law theory in their work, though they may also incorporate it in some way into their positivist theories of law.

Choose either (1) Aquinas’s or Finnis’s theory of natural law and (2) either Holmes’ or Hart’s critical appraisal of natural law. What can be learned from each that matters for the study of philosophy of law? Does the critique you select do justice to the substantive natural law theory you select? Why or why not?

Subfield 3: International Law and Human Rights: Answer one of the following.

A. The natural law doctrine has played an important part in the development of international law. Elaborate on the genesis and historical development of international law paying a particular attention to the natural law doctrine influences. Give examples of at least two concepts/principles of international law that stem directly or partially from the natural law doctrine.

B. Several concepts, doctrines and principles of international law have developed from domestic legal systems, especially from civil and common law. Choose at least two examples of such principles/concepts/doctrines, elaborate on their substantive content, and historical development. Islamic law, as the third largest domestic legal tradition has impacted international law to a much smaller extent. Explain why.

January 2013

Constitutional Studies Comp, January 2013

Subfield I: American Constitutional Law and Judicial Politics

1. In *Sherbert v. Verner* (1963), Justice Stewart wrote: “And the result [of the Court’s First Amendment religion precedents] is that there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court’s . . . construction of the Establishment Clause.” To what extent was Justice Stewart correct in 1963 and to what extent is he correct today?

2. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) Chief Justice Roberts and Justice Breyer held different theories of *Brown v. Board of Education* (1954). (1) Describe the theories of (a) Roberts and (b) Breyer and (2) show how they reflect different theories of the Constitution as a whole. Show also (3) which theory (of Roberts or Breyer) conforms to the understanding of the Constitution as a whole that one finds in *The Federalist*. Answer each part of this question. References to *The Federalist* should give the edition in a footnote with paper and page numbers in parentheses in the text of your answer, separated by a colon, e.g., (10:63).

Subfield 2: Legal Philosophy and Constitutional Interpretation

1. “Concrete originalists claim that a moral realist (or natural law) theory of constitutional interpretation frees judges to impose their personal values on the country and abandons the rule of law. For their part, moral realists claim that their approach is the only approach that really constrains judges in a manner consistent with the rule of

law.” Explain every part of this statement: why the originalists say what they say; why the moral realists say what they say. Your answer should display your knowledge of the difference between realist and conventionalist theories of (1) word meaning, (2) precedent, and (3) value.

2. John Hart Ely in *Democracy and Distrust* has put forward a theory to justify a certain kind of judicial review meant to be compatible with and legitimate in democratic systems as such. Does his theory solve the so-called counter-majoritarian problem? Is judicial review as he defends it not only compatible with democratic legitimacy but necessary for it? Is his account the best or at least an adequate or defensible theory of judicial review? Are there better defenses and thus better accounts of the scope of judicial review?

3. Compare and critically assess TWO of the following four legal theorists: Aquinas, Hart, Finnis, and O.W. Holmes, on the question of the relationship between law and human nature, OR on the relationship between law and morality.

Subfield 3: International Law and Human Rights

1. Human rights law constitutes an important part of the law of nations. Elaborate on the genesis and historical development of international human rights law paying a particular attention to the natural law doctrine influences. Your answer should include a discussion of at least two natural law thinkers/philosophers.
 2. Several concepts, doctrines and principles of international law have developed from the civil domestic legal system, as well as from the ecclesiastical law. Choose at least one example from each legal system and elaborate on their substantive content, historical development, and influences on the law of nations.
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September 2013

International Law and Human Rights

1. There are several methods that states can resort to while peacefully resolving their disputes. Elaborate on main procedural and normative features of at least two venues for interstate peaceful resolution, linking their design to domestic legal systems. What factors shape states' choices of peaceful settlement venues?
2. The norms and institutions of international human rights seem in some ways to reinforce democratic constitutional systems, and in other ways to be in deep tension with democratic constitutionalism. Explain this apparent paradox, and discuss what it implies regarding the sources of legitimacy of human rights law within a democratic constitutional order.

Philosophy of Law and Judicial Interpretation

1. Describe the change of the Supreme Court's thinking from *Brown v. Board of Education* (1954) to *Parents Involved v. Seattle School District* (2007) in terms of (1) competing theories of the Constitution's basic normative properties and (2) different theories precedent. Your answer to this question must focus on these two specific issues, not on other issues like competing approaches to constitutional interpretation, competing theories of judicial review, or competing conceptions of the framers' intentions.
2. Compare and critically assess TWO of the following four legal theorists on the question of the relationship between law and human nature OR on the relationship between law and morality: Aquinas, Hart, Finnis, and O.W. Holmes.

American Constitutional Law and Judicial Politics

1. Abraham Lincoln once described the relationship between the Declaration and the Constitution as “an apple of gold” in a “picture of silver” Explain Lincoln's understanding of the relationship between the Declaration and Constitution. Compare his understanding with at least two other American statesmen or scholars who take a

different view.

2. Judicial review has become a near universal practice in the world. Is this a good development?

January 2014

Constitutional Studies Comprehensive Exam Questions

Field 1: American Constitutional Law and Judicial Politics

1. Alexander Bickel argued that judicial review suffers from a counter-majoritarian difficulty because, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive...it exercises control, not in behalf of the prevailing majority, but against it. Robert Dahl disagreed; he claimed that, “[e]xcept for short-lived transitional periods...the Supreme Court is inevitably a part of the dominant national alliance... [and] of course supports the major policies of the alliance.” Based on modern empirical scholarship, which of these views is more accurate? In forming your response: (1) consider alternative definitions of the “majority” and (2) consider the theoretical reasons why the Court might support or undermine the majority and the empirical evidence to support those theories.

2. Justice Robert Jackson once said of the Supreme Court, “We are not final because we are infallible, but we are infallible because we are final.” Use a set of Supreme Court decisions and/or a body of scholarly literature to argue for or against the validity of Justice Jackson's statement.

Field 2: Philosophy of Law and Constitutional Interpretation

1. Apply Michael Moore's theory of legal interpretation to the evolution of Supreme Court doctrine regarding the meaning of liberty in the gay rights cases *Bowers* to *Romer* to *Lawrence* to *Windsor*. Your answer should evince your understanding of Moore's distinction between realist and conventionalist theories of (1) word meaning and (2) precedent. You should also show how the opinions of the individual justices manifest these different theories of word meaning. While keeping the focus on the gay-rights series of cases, you should cite cases outside the gay-rights series (e.g., *Planned Parenthood v. Casey*) as needed to illuminate the different positions in the gay-rights debate.

2. Is the legal philosophy of John Finnis Thomistic, Hartian (as in H.L.A. Hart), neither, or both? Explain, with special reference to *Natural Law and Natural Rights*.

Field 4: International Law and Human Rights

1. The emergence of international human rights norms in the last 65 years represents enormous challenges to an international system based on Westphalian notions of state sovereignty. How does it still make sense today to speak of state sovereignty as the foundation for international law? What does it mean? Can it be reconciled coherently with the international supervision and enforcement of human rights norms regulating the relationships between states and their citizens?

2. Current international law constitutes largely a secular legal system. Using historical as well as contemporary examples, elaborate on the role that religion/religious legal systems (for example ecclesiastical law, Islamic law) played and continue to play in the development of substantive international law. What are some of most important points of contention between religion and secularism on the international arena?

Constitutional Studies Comprehensive Exam Questions

Field 1: American Constitutional Law and Judicial Politics

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(2) consider the theoretical reasons why the Court might support or undermine the majority and the empirical evidence to support those theories.

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Field 2: Philosophy of Law and Constitutional Interpretation

1. Apply Michael Moore's theory of legal interpretation to the evolution of Supreme Court doctrine regarding the meaning of liberty in the gay rights cases *Bowers* to *Romer* to *Lawrence* to *Windsor*. Your answer should evince your understanding of Moore's distinction between realist and conventionalist theories of (1) word meaning and (2) precedent. You should also show how the opinions of the individual justices manifest these different theories of word meaning. While keeping the focus on the gay-rights series of cases, you should cite cases outside the gay-rights series (e.g., *Planned parenthood v. Casey*) as needed to illuminate the different positions in the gay-rights debate.

2. Is the legal philosophy of John Finnis Thomistic, Hartian (as in H.L.A. Hart), neither, or both? Explain, with special reference to *Natural Law and Natural Rights*.

Field 3: Comparative Constitutional Systems and Law

1. Make the case *for* and *against* the American Supreme Court's use of the foreign constitutional case law of other advanced democracies in the interpretation of the United States Constitution. (Another way of putting the question is whether the U.S. Supreme Court should seek to bring its constitutional law into harmony with the comparable jurisprudence of other western democracies.) Be as detailed as you can and illustrate with examples from at least two areas of constitutional case law.

2. Sources of substantive as well as procedural law differ greatly across domestic legal traditions. First, elaborate on the main sources of law in the Islamic legal tradition, drawing on their historical development and using modern examples. Secondly, explain what are the main differences between Islamic legal tradition and the Western legal traditions in their approach to dispute resolution mechanisms?

Constitutional Studies Comprehensive Exam Questions

Field 1: American Constitutional Law and Judicial Politics

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2. Justice Robert Jackson once said of the Supreme Court, "We are not final because we are infallible, but we are infallible because we are final." Use a set of Supreme Court decisions and/or a body of scholarly literature to argue for or against the validity of Justice Jackson's statement.

Field 2: Philosophy of Law and Constitutional Interpretation

1. Apply Michael Moore's theory of legal interpretation to the evolution of Supreme Court doctrine regarding the meaning of liberty in the gay rights cases *Bowers* to *Romer* to *Lawrence* to *Windsor*. Your answer should evince your understanding of Moore's distinction between realist and conventionalist theories of (1) word meaning and (2) precedent. You should also show how the opinions of the individual justices manifest these different theories of word meaning. While keeping the focus on the gay-rights series of cases, you should cite cases outside the gay-rights series (e.g., *Planned parenthood v. Casey*) as needed to illuminate the different positions in the gay-rights debate.

2. Is the legal philosophy of John Finnis Thomistic, Hartian (as in H.L.A. Hart), neither, or both? Explain, with special reference to *Natural Law and Natural Rights*.

Field 3: Comparative Constitutional Systems and Law

1. Make the case *for* and *against* the American Supreme Court's use of the foreign constitutional case law of other advanced democracies in the interpretation of the United States Constitution. (Another way of putting the question is whether the U.S. Supreme Court should seek to bring its constitutional law into harmony with the comparable jurisprudence of other western democracies.) Be as detailed as you can and illustrate with examples from at least two areas of constitutional case law.

2. Sources of substantive as well as procedural law differ greatly across domestic legal traditions. First, elaborate on the main sources of law in the Islamic legal tradition, drawing on their historical development and using modern examples. Secondly, explain what are the main differences between Islamic legal tradition and the Western legal traditions in their approach to dispute resolution mechanisms?

January 2015

Constitutional Studies Comprehensive Examination
Winter 2015

This is an open book exam. You have six hours to complete the exam. Please return your answers to Professors Michael Zuckert and Geoff Layman within six hours of beginning the exam.

I. Philosophy of Law and Judicial Interpretation (answer one):

1. Is the legal philosophy of John Finnis Thomistic, Hartian (as in H.L.A. Hart), neither, or both? Explain, with special reference to *Natural Law and Natural Rights*.
2. "Originalism" continues to be the dominant method of constitutional interpretation, at least among jurists who trouble to proclaim a method. You are to:
 - A. Describe the following varieties of originalism: (1) abstract originalism; (2) concrete originalism (a) definitional variety, and (b) applications variety.
 - B. Connect each of these three varieties of originalism to a specific theory of language meaning.
 - C. Sketch at least one argument for both (1) abstract originalism and (2) concrete originalism.

II. American Constitutional Law and Judicial Politics (answer one):

1. For decades, the judicial politics literature has been preoccupied with a debate between the "attitudinal" and "legal" models of judicial decision making; yet, as early as 1994, prominent judicial politics scholars declared the legal model to be a "straw man" argument that no judge or scholar actually believes. What is the status of the "legal model" today? That is, what is the current state of empirical evidence regarding the role of "law" in American judicial decision making? In forming your response: (1) consider alternative perspectives on what it means for judges to follow the "law" and (2) consider strengths and weaknesses of the "legal model" and its modern incarnations.
2. For its jurisprudence of freedom of speech, equal protection, or no religious establishment, answer the following questions:
 - A) Has the Supreme Court articulated a clear and consistent doctrine?
 - B) To what extent does that doctrine(s) reflect the actual text of the Constitution?
 - C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

III. International Law and Human Rights (answer one):

1. 1. The principle of sovereignty constitutes a paramount principle of international law. Elaborate on genesis and historical development of the principle of sovereignty paying a particular attention to the Western and Islamic understanding of this concept. In your analysis, make sure to refer to the jurisprudence of the International Court of Justice.
 2. "One of the persistent challenges of constructing an effective system of international human rights law has been to manage the tensions between universal norms on the one hand and the fact of enormous diversity (whether ethical, political, religious, ethnic, etc.) among the many different societies within the human family, on the other hand. Describe how the global human rights system has sought to reconcile these tensions, using specific examples from international human rights law and institutions. Do you think that the international human rights project has been successful at accounting for and accommodating legitimate claims of pluralism among different human societies? Justify your answer with specific examples."
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January 2016

To the Student:

Answer a total of 3 questions: one question from Field 1, one question from Field 2, and one question either from Field 3 or Field 4. Each answer must be 1700 words or less, double spaced, PDF. Save a PDF of each answer for later production if requested by the DGS. Time limit for the exam: 6 hours from the time sent to you.

Field 1: Philosophy of Law and Constitutional Interpretation

1. The history of constitutional doctrine that culminates in *Obergefell v. Hodges* (2015) features debate among the justices over what the Supreme Court decided in *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), and *Loving v. Virginia* (1967). Describe this debate in terms of different theories of (1) the *holding* and (2) the *weight* of precedent in constitutional decision. Your answer should employ the categories set forth in Michael Moore's "A Natural Law Theory of Interpretation."
2. How does Ronald Dworkin's theory of constitutional interpretation (1) compromise the distinction between the rule of law and the rule of men and (2) undermine the idea that "checks and balances" can obviate the need for cultivating a competent and public-spirited leadership community? Your answer must contain a full description of Dworkin's theory.

Field 2: American Constitutional law and Judicial Politics

1. Alexander Hamilton famously described the Supreme Court under the U.S. Constitution as possessing "neither FORCE nor WILL, but merely judgment." Decades later, in evaluating the American constitutional system, Alexis De Tocqueville argued that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Setting aside the normative and theoretical issues behind these perspectives, what insights can empirical social science lend to this debate? In answering this question, be sure to cite the relevant literature addressing (1) the Court's propensity to attempt to alter social and political outcomes, (2) the likelihood of the Court's decisions prevailing over the preferences of other social and political actors, and (3) whether the Court's rulings actually influence the long-term patterns of social and political behavior.
2. "When *Garcia v. SAMTA* (1985) overruled *National League of Cities v. Usery* (1976), Justices Powell, O'Connor, and Rehnquist pledged that they would continue to fight for the idea of Tenth Amendment limitations on Congress's power. Success for the *Garcia* dissenters came in *New York v. U.S.* (1992), *Printz v. U.S.* (1997), and *NFIB v. Sebelius* (2012)." Explain this statement in a way that describes (1) what is meant by Tenth Amendment limitations of Congress's power and (2) what the Court held in each of the five cases.
3. *Brown v. Board of Education* (1954) can be read either as (1) proscribing racial classifications in the law (except for "remedial purposes") or (2) mandating racial integration as a means to an equal-opportunity

society. In *Swann v. Charlotte-Mecklenburg* (1971), the Supreme Court implicitly rejected the second interpretation of *Brown*. Explain how the Court's choice in *Swann* reflects the framers' choice for a constitution of "checks and balances." Your answer should describe the decisions in *Brown* and *Swann* together with the alternative to "checks and balances" and why the framers rejected that alternative.

Field 3: Comparative Constitutional Law

1. Is it useful to group domestic legal systems into broad categories? What are the main characteristics of these categories and is there a difference between the concept of a domestic legal system and a domestic legal tradition? Elaborate on the inherent link between culture, laws, norms, and history to defend your position.
2. Fundamental characteristics/features of a domestic legal system may be enshrined in constitutions or laws of lower status. Elaborate on the relationship between law and religion in the context of Islamic constitutionalism, referring to the constitutions and laws of specific Islamic law states.

Field 4: International Law and Human Rights

1. Modern international law with its institutions constitutes largely a secular legal system. Using historical as well as contemporary examples, elaborate on the role that religion/religious legal systems (for example ecclesiastical law, Islamic law) played and continue to play in the development of substantive international law. What are some of important points of contention between religion and secularism on the international arena? Does this contention play a role in international courts?
2. Do international courts have authority over states? What does it mean for an international court to constitute an unbiased adjudicator? Furthermore, is it possible for international courts to reach high levels of authority over all states, regardless of their domestic legal traditions and other specific contextual state-level characteristics? Elaborate on the differences between domestic and international adjudicators in the context of their authority.

May 2016

Constitutional Studies Comp 5/17/2016

To the student: You have six hours to answer one question from Field I, one question from Field 2, and one question from either Field III or Field IV. Your answers may not exceed 1700 words. You must avoid plagiarism and the appearance of plagiarism. Accompany all quotes, paraphrases, and copied materials with full references. Double space your answers and send them PDF. Save a PDF copy of your answers for later production should the DGS request. Failure to comply with any of these instructions will mean failure on the exam.

Field I: Legal Philosophy and Constitutional Interpretation

- (1) The varieties of "originalism" have been described as (a) concrete originalism and (b) abstract originalism, with concrete originalism applying either the founding generation's (i) definitions or (ii) applications of constitutional words and phrases. Show how each of these three approaches to constitutional interpretation reflects a different theory of word meaning. Use the word 'liberty' for your example.
- (2) Make a case either for or against the U.S. Supreme Court's use of the case law of other advanced western democracies in interpreting the U.S. Constitution. Illustrate your answer with cases from at least two areas of constitutional law, and identify the metaethical position that your answer implies.

Field II: American Constitutional law and Judicial Politics

- (1) "RFRA" is the acronym of the Religious Freedom Restoration Act, enacted by Congress in 1993, in

response to the Supreme Court's decision in *Employment Division v. Smith* (1990). Though overruled as applied to the states in *Boerne v. Flores* (1997), RFRA was upheld as applied to federal agencies in *Gonzales v. O'Centro* (2006), a decision that was reaffirmed in *Burwell v. Hobby Lobby* (2014). Some 21 states (mostly red but some blue) have enacted "little RFRAs" of their own. Write an essay that describes the RFRA as a type of legislation and traces its judicial evolution. Your account of this development should (1) give a clear definition of RFRA *as a type of legislation*, (2) distinguish the Court's constitutional holdings from the Court's statutory holdings, and (3) identifies the ends for which the RFRA as a type of legislation was originally deployed and the ends for which it is now deployed.

- (2) It has been said: "The main thing at stake in the debate between Federalist and Anti-Federalist over the Constitution was the legacy of the American Revolution, with each side claiming to be the true preserver of the Revolution." Is this a true estimate of what was going on in the debate over the Constitution? How so? If not, what is a better way to understand the debate?

Field III: Comparative Constitutional Systems and Law

- (1) Is it useful to group domestic legal systems into broad categories? What are the main characteristics of these categories and is there a difference between the concept of a domestic legal system and a domestic legal tradition? Elaborate on the inherent link between culture, laws, norms, and history to defend your position. Is there something inherently different between various domestic legal systems/domestic legal traditions that make these categorization necessary?
- (2) Suppose you were asked to organize and teach a course in comparative constitutional law. What would be the purpose or purposes of such a course? What countries would you choose for comparisons and why? What questions would the course address? What topic areas would you cover and why?

Field IV: International Law and Human Rights

- (1) Current international law constitutes largely a secular legal system. Using historical as well as contemporary examples, elaborate on the role that religion/religious legal systems (for example ecclesiastical law, Islamic law) played and continue to play in the development of substantive international law. What are some of important points of contention between religion and secularism on the international arena? Does this contention play a role in international courts?
- (2) A major part of the legal world environment has become human rights. Provide a brief sketch of (a) how human rights have risen to such prominence and (b) whether these rights should be conceived as grounded in nature or in evolving social convention. Sketch a defense of your answer to (b).
- (3) Custom is one source of international law. Elaborate one important international customary norm, focusing on its substantive content and its historical development. Describe how the International Court of Justice has contributed to the recognition of customary law.

September 2016

CONSTITUTIONAL STUDIES COMPREHENSIVE EXAMINATION.

Answer one question from each set of questions below. Please answer the question actually asked.

American

1. Abraham Lincoln once described the relationship between the Declaration and the Constitution as "an apple of gold" in a "picture of silver" Explain Lincoln's understanding of the relationship between the Declaration and Constitution. Compare that understanding with at least two other American statesmen or scholars who take a different view.

2. Describe the changes in Fourteenth Amendment doctrine that moved the Supreme Court from *Bowers v. Hardwick* (1986) to *Lawrence v. Texas* (2003) and *Obergefell v. Hodges* (2015).

Comparative

3. Suppose you were asked to organize and teach a senior undergraduate course in comparative constitutional law. What would be the purpose or goals of such a course? What countries would you choose for comparison and why? What leading questions would the course address? What topical areas would you cover and why? And what materials, judicial and non-judicial, would you have the students read?"
4. Islamic law has a specific understanding of property that sharply contrasts with the way that Western legal traditions see human dominion over land and other types of property. Elaborate on these differences, referring to constitutions and laws of lower status of specific Islamic law states.

Philosophy and theories of Interpretation.

5. Assume that the following statement is true and explain it to undergraduates in a first course in constitutional studies: "**The interpretive debate in American constitutional law is not really a contest between 'originalism' and 'non-originalism'; at bottom it's a contest between the 'moral reading' (or 'philosophic approach') and 'pragmatism.' The outcome of this debate will determine whether one can advocate 'the rule of law' with intellectual honesty.**"
6. In which respects is John Finnis' *Natural Law and Natural Rights* a continuation of H. L. A. Hart's project in *The Concept of Law*? In which respects is Finnis' book a critique of Hart's legal theory? How successful do you find his critique, and why?

January 2017

Constitutional Studies Graduate Comprehensive Examination: (Spring 2017)

(Answer one question from each group below).

Philosophy of Law and Jurisprudence

1. In which respects is John Finnis' *Natural Law and Natural Rights* a continuation of H. L. A. Hart's project in *The Concept of Law*? In which respects is Finnis' book a critique of Hart's legal theory? How successful do you find his critique, and why?
2. Assume that the following statement is true and explain it to undergraduates in a first course in constitutional studies: "The interpretive debate in American constitutional law is not really a contest between "originalism" and "non-originalism"; at bottom it's a contest between the "moral reading" (or "philosophic approach") and "pragmatism." The outcome of this debate will determine whether one can advocate "the rule of law" with intellectual honesty.

American Constitutional Law and History

1. In Federalist 78, Publius contends "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." Craft an essay that evaluates Publius's claim. In your essay, refer to at least one subject area of Supreme Court cases (e.g. speech, press, privacy, equal protection)

as well as relevant the relevant secondary literature to substantiate your answer.

2. Numerous empirical studies of American judicial politics agree that U.S. Supreme Court justices are constrained in their decision making by the preferences of external actors (e.g., the public, Congress, or the president). However, these studies differ with regard to how and why the justices are susceptible to external influence. Describe at least three explanations for how and why Supreme Court justices are influenced by external actors, evaluate the evidence

supporting/contradicting each explanation, and make an argument for which explanation is most persuasive. You may focus on the influence of public opinion, other elected officials, or both.

Comparative Constitutionalism and Law

1. The relationship between secular law and religious law constitutes an important reality in the context of the Islamic legal tradition. Constitutions as well as laws of lower status reflect – albeit imperfectly – this relationship. Elaborate on the nexus between the “secular” law and the religious norms in the context of Islamic constitutionalism, focusing on the diversity of constitutional approaches within the Islamic world. Provide examples of constitutions and laws of lower status in specific Islamic law states, focusing on at least two countries where this relationship is regulated in a distinct way.
2. How can the explosion of the practice of judicial review around the world be explained? Is there a basic uniformity in how judicial review is practiced in the many constitutional systems that now deploy it? Is it effective? Effective for what?

May 2017

Constitutional Studies Comp Exam, May 2017
Answer one question from each Part as relevant.

Pt. I Philosophy of Law and Interpretation

1. Read the following two paragraphs carefully and answer the five enumerated questions. Answer the questions directly, without introductory or background commentary. Answers to questions other than the five enumerated will not count toward your grade.

In *Obergefell v. Hodges*, Justice Kennedy approached the word “liberty” differently from Justice Scalia. Kennedy held that the liberty protected by the Fourteenth Amendment extends to personal choices central to individual dignity and autonomy, that the full meaning of liberty is something that we learn from new insights through the passage of time, and that the framers of the Bill of Rights and the Fourteenth Amendment entrusted future generations to discover the full meaning of liberty. Justice Scalia held that the liberty protected by the Fourteenth Amendment extends only to those liberties that the framers of the Amendment understood protected in 1868. (1) What theory of word meaning does Kennedy follow regarding the word liberty? (2) What theory of word meaning does Scalia follow regarding the word liberty? (3) What method of constitutional interpretation does Kennedy

employ regarding the word liberty? (4) What method of constitutional interpretation does Scalia employ regarding the word liberty.

These conflicting approaches to liberty imply different understandings of constitutional democracy. Thus, Kennedy justified his approach as necessary to prevent the past from ruling the present, and Scalia justified his approach as necessary to prevent unelected judges from imposing their preferences on popular majorities.

(5) What method of interpretation would you employ to determine which of these justices is right about the meaning of constitutional democracy?

2. Compare any **two** of these philosophers of law on the question of **natural law: Thomas Aquinas, H. L. A. Hart, and John Finnis**. How do they define describe natural law? Do they think that it exists, and if so, in what form, and from what source/s? What role does natural law play, if any, in their broader legal philosophies? Which of the two thinkers you have chosen for this essay seems to you closer to the truth about natural law, and why?

Pt. II American

1. The study of judicial behavior often boils down to an analysis of the factors that motivate judges when making decisions. Describe at least three motivations commonly attributed to U.S. Supreme Court justices and evaluate the empirical evidence that supports each claim. For each supposed judicial motivation, identify the strongest evidence that the motivation does drive judicial behavior and the most serious concern with regard to that claim.
2. For its jurisprudence of freedom of speech, religious free exercise, or privacy, answer the following questions:

A) Has the Supreme Court articulated a clear and consistent doctrine?

B) To what extent does that doctrine(s) reflect the actual text of the Constitution?

C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

Pt. III Comparative

1. In the modern times Islamic legal tradition – as practiced by Islamic law states - secular law and religious law amalgamate in the context of constitutions as well as subconstitutional legal systems. Can one propose that there is indeed a “correct”, or a “unified” balance between religious laws and secular laws/institutions in all Islamic law states? In answering the question, provide insights from three different Islamic law states: one where religious laws govern most of the legal system, one where secular laws regulate an overwhelming majority of the legal system, and one where there is almost an equal balance between “the secular” and “the religious.” Use examples from constitutions and subconstitutional legal system.
2. "Some Supreme Court justices sternly resist the use of foreign constitutional law as a guide to interpreting the U.S. Constitution. Other justices just as sternly engage the decisions and reasoning of foreign constitutional courts in deciding cases arising under the Constitution. Under what circumstances would it be appropriate for a justice to adopt a posture of resistance to the use of foreign law in American constitutional decision-making? Under what circumstances would it be appropriate to adopt a posture of engagement? Cite examples of Supreme Court cases in which one or the other of these perspectives has been advanced."

September 16, 2017 – no exam questions

January 2018

Constitutional Studies Comprehensive Exam – Spring 2018

Instructions: There are three sections to this exam and you are required to answer one question in each section. No answer can be longer than 1,700 words. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references.

Section 1: Philosophy of Law and Constitutional Interpretation (Answer One)

1. Compare Thomas Aquinas and H. L. A. Hart on (1) the question of natural law, or, on (2) the relationship between law and morality.

2. Compare similarities and differences of the approaches to constitutional interpretation in John Hart Ely's *Democracy and Distrust* and Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*. Identify two areas in American constitutional jurisprudence in which those differences *might* result in contrasting judicial outcomes, and explain why.

Section 2: American Constitutional Law and Judicial Politics (Answer One)

1. It has been said that, "America is a constitutional republic, not a democratic republic." Compose an essay that discusses this quotation in light of (1) the arguments of *The Federalist Papers* and (2) an aspect of United States Supreme Court jurisprudence since 1932.
2. Numerous empirical studies of American judicial politics agree that U.S. Supreme Court justices are constrained in their decision-making by the preferences of external actors (e.g., the public, Congress, or the president). However, these studies differ with regard to how and why the justices are susceptible to external influence. Describe at least three explanations for how and why Supreme Court justices are influenced by external actors, evaluate the evidence supporting/contradicting each explanation, and make an argument for which explanation is most persuasive. You may focus on the influence of public opinion, other elected officials, or both.
3. "Romer v. Evans (1997) marked two key changes in the Supreme Court's approach to homosexual rights: (1) the Court's conception of the right that called for protection; and (2) what counted or failed to count as an adequate reason for abridging the right." Explain this statement in a way that includes the following information. (a) The contending conceptions of the right in the leading case prior to *Romer*. (b) The name of that earlier case. (c) The kind of reason declared inadequate in *Romer*. (d) The case that later confirmed *Romer's* two changes in constitutional doctrine.

Section 3: Comparative Constitutional Systems (Answer One)

1. In the context of Islamic milieu, constitutions express a specific relationship between the religious and the secular. Policymakers may be required to take holy oaths, sharia may be officially positioned as the main source of law, or a main source of legislation, etc. Elaborate on the relationship between law and religion in the context of Islamic constitutionalism, referring to specific constitutions. Use examples where religious precepts constitute a small fraction of the legal systems, as well as examples where Islamic law overshadows the majority of domestic laws.
2. Make the case *for* and *against* the American Supreme Court's use of the foreign constitutional case law of other advanced democracies in the interpretation of the United States Constitution. (Another way of putting the question is whether the U.S. Supreme Court should seek to bring its constitutional law into harmony with the comparable jurisprudence of other western democracies.) Be as detailed as you can and illustrate with examples from at least two areas of constitutional case law.

May 2018

Constitutional Studies Comprehensive Exam – Spring 2018

Instructions: There are three sections to this exam and you are required to answer one question in each section. No answer can be longer than 1,700 words. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references.

Section 1: Philosophy of Law and Constitutional Interpretation (Answer One)

1. Compare and critically assess Thomas Aquinas and H. L. A. Hart on EITHER (a) the relationship between law and morality OR (b) the existence and function of natural law.
2. John Hart Ely's *Democracy and Distrust* describes several criteria by which the judiciary ought to consider judging duly-enacted legislative acts to be unconstitutional. Describe and explain Ely's criteria, and then explain how an "originalist" would reply to this approach to constitutional interpretation.

Section 2: American Constitutional Law and Judicial Politics (Answer One)

1. It has been said that, "American is a constitutional republic, not a democratic republic." Compose an essay that discusses this quotation in light of at least one of the following: (1) the arguments of *The Federalist Papers*, (2) Lincoln's political thought, (3) an aspect of United States Supreme Court jurisprudence since 1932.
2. Can courts influence social change in the United States? In your response, be sure to consider both the propensity of judges to initiate social change and the likelihood that they will succeed in securing social change. Your answer may consider evidence related to specific examples; however, it must consider broad patterns of behavior to support your argument.

Section 3: International Law and Human Rights (Answer One)

1. Is International law truly "international"? As a legal system that has not evolved in a legal vacuum, what domestic legal traditions have influenced the substantive and procedural aspects of international law? Has the flow of legal knowledge from the domestic onto the international realm been equal across all major legal traditions of the world?
2. "The emergence of international human rights norms in the last 65 years represents enormous challenges to an international system based on Westphalian notions of state sovereignty. How does it still make sense today to speak of state sovereignty as the foundation for international law? What does it mean? Can it be reconciled coherently with the international supervision and enforcement of human rights norms regulating the relationships between states and their citizens? "

September 2018

*Constitutional Studies Subfield Examination
Department of Political Science
University of Notre Dame*

September 2018

I. Philosophy of Law and Constitutional Interpretation

Question A:

In the 4th paragraph from the end of *Federalist* 78 (lines 168-78), Alexander Hamilton writes:

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injuries to the private rights of particular classes of citizens by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motive of the injustice they meditate, to qualify their attempts.

Write an essay that shows how the above comment fits into the theory of responsible government set forth in *The Federalist* (esp. Nos. 63, 71). This question seeks to test your understanding of the details of Publius's theory of responsible government and the how that theory justifies judicial enforcement of rights beyond those enumerated in the positive law. This question is not designed to elicit your views on the soundness of Publius's theory.

Question B:

Compare and critically assess the thought of Thomas Aquinas and H. L. A. Hart on *either* (a) the relationship between law and morality, *or* (b) the existence and function of natural law.

II. American Constitutional Law and Judicial Politics

Question A:

Alexander Bickel famously argued that the judiciary's power to declare laws unconstitutional creates a "countermajoritarian difficulty." In Bickel's words, "The root difficulty is that judicial review is a countermajoritarian force in our system" because it necessarily "thwarts the will of representatives of the actual people of the here and now." Over the last 65 years, political scientists have subjected this empirical claim to rigorous examination. Summarize the systematic empirical evidence for and against Bickel's claim. Based on the available evidence, was his claim accurate?

Question B:

For its jurisprudence of freedom of speech, religious free exercise, or no religious establishment, answer the following questions:

- A) Has the Supreme Court articulated a clear and consistent doctrine?
- B) To what extent does that doctrine(s) reflect the actual text of the Constitution?
- C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

III. International Law and Human Rights

Question A:

Modern global order, including its legal foundation – international law – is largely secular. However, many principles and norms of international law are firmly anchored in the normative tradition of the Christian religion. Yet, the Islamic tradition has been instrumental in contributing several principles to the law of nations. Give examples of principles, norms, and doctrines of international law, that stem from the Christian religion and the Islamic tradition.

Question B:

From its inception in 1948, an international law of human rights that aspires to universality has always been in some tension with the idea of national constitutionalism. Explain how those tensions have manifested themselves and evolved over the last 70 years of the development of international law and human rights. Can they be reconciled? Use specific examples of tension, conflict, or harmony between national constitutional traditions and international human rights to support your argument.

January 2019

Constitutional Studies Subfield Examination

Department of Political Science

University of Notre Dame

January 2019

The Constitutional Studies comprehensive examination is an open-book, written exam to be completed and submitted no later than 6 hours after the exam is distributed. The 6-hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. Failure to meet the deadline means failure on the exam.

The exam consists of three sections. One question must be answered from each section. No answer can be longer than 1,700 words. Answers must be the student's own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Answers should be doubled-spaced; students must save copies of their answers in PDF for future production as the DGS may request.

Answer one question from Sections I, II, and III.

I. Philosophy of Law and Constitutional Interpretation

Question A:

Compare and critically assess the thought of Thomas Aquinas and H. L. A. Hart on either (a) the relationship between law and morality, or (b) the existence and function of natural law.

Question B:

Craft an essay discussing the "New Originalism." Your essay should address the following questions and issues:

- What is the "New Originalism"?
- Contrast the "New Originalism" with the "old" originalism(s).
- What concerns and arguments have animated and inspired the development of the "New Originalism"?
- Does the "New Originalism" produce different outcomes in concrete cases or specific issues of constitutional law? If so, give examples.
- Does the "New Originalism" respond adequately to the well-known objections that were and are lodged against the "old" originalism(s)?

Question C:

Specify the key propositions of Hamilton's argument for judicial review in Federalist No. 78 and discuss at least three ways in which that argument assumes objective standards of political morality.

II. American Constitutional Law and Judicial Politics

Question A:

The preeminent view of judicial behavior in the social science literature suggests that judges are rational actors who strategically pursue their goals based on their available options and constraints. Yet, proponents of this view sometimes disagree about the nature of judges' goals. Describe at least three types of goals commonly attributed to strategic judges and evaluate the empirical evidence that judges actually pursue each of those goals.

Question B:

In *New York v. United States* (1992) and *Printz v. United States* (1997), the Supreme Court of the United States addressed what it described as "the oldest question of constitutional law": whether Congress may require state legislatures or state executives to enforce federal laws against individuals. In these cases, the Supreme Court held if the federal government regulates individuals, it must enforce the regulation itself; it cannot require the states to enforce it. This holding has become known as "the anticommandeering rule." In *Murphy v. NCAA* (2017), the Supreme Court provided the following three reasons to support of the anticommandeering rule: (1) "the rule serves as one of the Constitution's structural protections of liberty"; (2) "the anticommandeering rule promotes political accountability"; and (3) "the anticommandeering principle prevents Congress from shifting the cost of regulation to the States." Critically evaluate each of these reasons as a justification for the anticommandeering rule.

Question C:

For its jurisprudence concerning the right to privacy, the death penalty, or no religious establishment, answer the following questions:

- A) Has the Supreme Court articulated a clear and consistent doctrine?
- B) To what extent does that doctrine(s) reflect the actual text of the Constitution?
- C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

III. International Law and Human Rights

Question A:

Modern international law constitutes a secular legal system. Using historical examples, elaborate on the role that religion, religion-based doctrines, and religion-based legal systems have played in the development of international law. Identify two areas of international law that have been impacted most by a religion-based system of norms. Does the contention between religious norms and secularism play an important role in modern international law?

Question B:

Can constitutional principles and traditions of popular sovereignty and democratic self-governance be reconciled with the constraints of international norms and institutions in areas traditionally considered to be part of essential domestic jurisdiction, such as the fundamental rights of citizens? Answer the question with reference both to constitutional theory and also with some specific illustrations of how constitutional law and international law relate to one another in practice in the United States or elsewhere.

May 2019

Constitutional Studies Comprehensive Exam

Field I: Legal Philosophy and Constitutional Interpretation

1. Describe the disagreement among the justices of the U.S. Supreme Court in **one** of the following cases in terms of Michael Moore's account of the different theories of precedent:
 - Planned Parenthood v. Casey (regarding the holding and weight of Roe v. Wade);
 - Lawrence v. Texas (regarding the holding and weight of Bowers v. Hardwick);
 - D.C. v. Heller (regarding the holding and weight of U.S. v. Miller).

Your answer should describe (1) the different theories of holding and weight and (2) the theories of holding and weight evinced in both the majority and minority opinions of the case that you choose.

2. Craft an essay discussing the "New Originalism." Your essay should address the following questions and issues:
 - What is the "New Originalism"?
 - Contrast the "New Originalism" with the "old" originalism(s).
 - What concerns and arguments have animated and inspired the development of the "New Originalism"?
 - Does the "New Originalism" produce different outcomes in concrete cases or specific issues of constitutional law? If so, give examples.
 - Does the "New Originalism" respond adequately to the well-known objections that were and are lodged against the "old" originalism(s)?

Field II: American Constitutional Law and Judicial Politics

1. For its jurisprudence concerning the right to privacy, the death penalty, *or* no religious establishment, answer the following questions:
 - a) Has the Supreme Court articulated a clear and consistent doctrine?
 - b) To what extent does that doctrine(s) reflect the actual text of the Constitution?
 - c) Explain why we might (or might not) expect a major change in doctrine in the next five years?
2. Can courts influence social change in the United States? In your response, be sure to consider both the propensity of judges to initiate social change and the likelihood that they will succeed in securing social change. An ideal answer should offer evidence relating to specific examples and broad patterns of behavior to support your argument.

Field III: International Law and Human Rights

1. International law contains detailed rules concerning peaceful resolution of disputes, ranging from bilateral negotiations to adjudication. Describe legal features of arbitration and adjudication, elaborating on their differences, and giving examples of disputes where states chose each of these binding resolution methods.
2. Islamic law states (ILS) have specific preferences regarding methods of peaceful resolution methods, especially the third-party nonbinding and binding methods. Draw on characteristic of the Islamic legal tradition, as well as the Bahrain/Qatar dispute to explain these states' preferences.

January 2020

Directions: You have six hours to answer one question from Field I, one question from Field II, and one question from Field III. *Please read the questions carefully and answer the questions asked.* Your answers may not exceed 1,700 words. You must avoid plagiarism *and* the appearance of plagiarism. Accompany all quotes, paraphrases, and copied materials with full references. Double space your answers and send them formatted as a PDF. Save a copy of your answers for later production should the DGS request them. Failure to comply with any of these instructions will mean failure on the exam.

Field I: American Constitutional Law and Judicial Politics

- (1) In *United States v. Darby* (1941), Justice Stone observed that the Tenth Amendment “states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment, or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.” Are the Burger, Rehnquist, and Roberts Courts' federalism decisions consistent with Justice Stone's observation? Was Justice Stone correct?
- (2) In *Federalist 78*, Publius contends “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” Craft an essay that evaluates Publius' claim. In your essay, refer to at least one subject area of Supreme Court cases (e.g. speech, press, privacy, equal protection) as well as relevant the relevant secondary literature to substantiate your answer.

Field II: Philosophy of Law and Constitutional Interpretation

- (1) In *Bowers v. Hardwick* (1986), Justices White and Blackmun disagreed about how to characterize what the Court had decided in *Griswold v. Conn.* (1965) and *Eisenstadt v. Baird* (1972). Describe this disagreement in terms of Michael Moore's account of the different theories of the holdings of precedent cases. Begin your answer with a full statement of Moore's description of the different theories, and then describe the White and Blackmun opinions in terms of Moore's categories.
- (2) What, according to H. L. A. Hart, is the best available "concept of law"? How does he develop his legal theory in dialogue with earlier philosophers of law? Would you classify Hart's theory as "positivist"? Why or why not? What are the theory's greatest strengths and weaknesses, in your view?

Field III: International Law and Human Rights

- (1) Modern international law constitutes largely a secular legal system that co-exists alongside Islamic international law. What are some of important points of contention between the Islamic legal tradition and classical international law? What international methods of peaceful settlement attract states representing Islamic legal tradition?
- (2) What is the relationship between "the secular" and "the religious" in international law? Elaborate on the tensions and coexistence of secular norms and religion-grounded norms in the historical and contemporary context.

June 2020

Instructions:

The Constitutional Studies comprehensive examination is an open-book, written exam, to be completed and submitted no later than 6 hours after the exam is distributed. The 6-hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies only for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. In light of COVID-19, 2 additional hours will be given for the June 2020 comp for a total time of 8 hours for native English speakers and 9.5 hours for non-native speakers. Failure to meet the deadline means failure on the exam.

*The exam consists of three questions. **No answer can be longer than 1,700 words.** Answers must be the student's own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Answers sent PDF must be doubled-spaced; students must save copies of their answers in PDF for future production as the DGS may request.*

Answer one question for Sections I, II, and III.

Subfield I. Legal Philosophy & Constitutional Interpretation

1. Michael Moore describes three theories of word meaning, one “realist” theory, and two “conventionalist” theories. Write an essay that (1) describes Moore’s three theories of word meaning and (2) classifies the following theorists in terms of Moore’s categories: Ronald Dworkin, William Rehnquist, and Moore himself. This question does not call for your personal assessment of any of these theories or theorists.
2. Compare any **two** of the following three legal theorists: Thomas Aquinas, H. L. A. Hart, and John Finnis, **on either** (1) the relationship between law and human nature, **or** (2) the relationship between law and morality.
3. What is the “new originalism?” How does it differ from the “old originalism?” What are the leading criticisms of each approach? Present example(s) from the Supreme Court’s jurisprudence that helps illustrate the similarities and differences between the old and new originalism.

Subfield II: American Constitutional Law

1. “Dissenting in *Obergefell v. Hodges*, Chief Justice Roberts denied that Ohio had deprived James Obergefell of any “liberty” secured by the Due Process Clause of the Fourteenth Amendment. Roberts ignored the intentions of the Reconstruction Congress and cited “our cases” instead (namely, *DeShaney v. Winnebago* and *SanAntonio v. Rodriguez*). Roberts’s performance in this case attests Dworkin’s description of judicial thinking in hard cases.”

Write an essay explaining the above statement. Your answer should clarify (1) the substantive right that *Obergefell* declared; (2) Roberts’s view of the kind of liberty secured by the Fourteenth

Amendment; (3) why Roberts elected to ignore the intentions of the Reconstruction Congress; (4) how Roberts's opinion attests Dworkin's description of judicial decision in hard cases. This question does not call for your personal assessment of Roberts's performance, Dworkin's theory, or any of the cases involved.

2. Alexander Bickel famously argued that the judiciary's power to declare laws unconstitutional creates a "countermajoritarian difficulty." In Bickel's words, "The root difficulty is that judicial review is a countermajoritarian force in our system" because it necessarily "thwarts the will of representatives of the actual people of the here and now." Over the last 65 years, political scientists have subjected this empirical claim to rigorous examination. Summarize the systematic empirical evidence for and against Bickel's claim. Based on the available evidence, was his claim accurate?

Subfield III: International Law & Human Rights

1. What does the concept of international peaceful dispute resolution mean? Elaborate on the various methods of international dispute resolution, as listed in the United Nations Charter. Does the Islamic concepts of justice and peaceful resolution fit well into the international understanding of these notions? What are the differences?
2. Describe sources of international law and their place in the historical development of international law. Give examples of practical use of these sources by referring to the jurisprudence of the International Court of Justice.

January 2021

Instructions:

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The exam consists of three questions. No answer can be longer than 1,700 words. Answers must be the student's own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Answers sent PDF must be doubled-spaced; students must save copies of their answers in PDF for future production as the DGS may request.

Answer one question for Sections I, II, and III.

I. Philosophy of Law and Constitutional Interpretation

1. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts disagreed with Justice Breyer about the promise of *Brown v. Board of Education*. (1) Describe that debate. (2) With whom would a concrete originalist agree? (3) With whom would an abstract originalist agree? Explain your answers. As you do so, keep in mind that the Fourteenth Amendment was ratified in 1868.
2. Compare and critically assess the thought of Thomas Aquinas and H. L. A. Hart on *either* (a) the relationship between law and morality, *or* (b) the existence, meaning, and function of natural law.

II. American Constitutional Law and Judicial Politics

1. In *Federalist* 78, Alexander Hamilton refers to the judiciary as “the least dangerous branch.” Compose an essay evaluating Hamilton’s claim using as evidence at least two streams of constitutional jurisprudence (e.g. free speech, Commerce Clause, freedom of religion).
2. Numerous empirical studies of American judicial politics agree that U.S. Supreme Court justices are constrained in their decision making by the preferences of external actors (e.g., the public, Congress, or the president). However, these studies differ with regard to how and why the justices are susceptible to external influence. Describe at least three explanations for how and why Supreme Court justices are influenced by external actors, evaluate the evidence supporting/contradicting each explanation, and make an argument for which explanation is most persuasive. You may focus on the influence of public opinion, other elected officials, or both.

III. Comparative Constitutional Systems and Law

1. In a 2005 conversation at American University, Justices Scalia and Breyer debated the role of foreign law in constitutional interpretation. A separate but equally important question is the role of foreign law in constitution-*making*. The United States has, historically, been a major exporter of constitutional ideas, with Germany and South Africa assuming more prominent status in recent years. What ought to be the purpose of consulting other countries' experiences in adopting a new constitution and what are potential limitations? Put differently, when is consultation of foreign sources most and least useful? What specific factors ought constitution-makers to consider when consulting foreign sources?

In your answer, note, too, a larger underlying consideration about the universality or particularity of constitutional commitments in general. For example, national constitutions often employ similar language about, say, the freedom of expression, due process of law, equal protection. Are these cognate commitments essentially the same? How do we still find important differences across jurisdictions?

To make your argument, draw from the experiences of at least two countries, demonstrating when constitutional ideas are most and least translatable. Be specific in your answer and cite any relevant literature. Consider, too, focusing on specific issues areas (speech/expression, religion, due process, equality/affirmative action) to ensure your answer is sufficiently concrete.

2. Some scholars propose that there is a trend toward secularization of domestic legal systems. Is the Islamic legal tradition - as expressed in constitutions and the subconstitutional legal systems of Islamic law states - becoming more acceptant of secular legal features? Identify one legal feature of the Islamic legal tradition that is unlikely to be replaced by non-religious legal institutions.

Saturday, January 22, 2022

Instructions

The Constitutional Studies comprehensive examination is an open-book, written exam, to be completed and submitted no later than 6 hours after the exam is distributed. The 6-hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies only for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. During COVID, students have an additional 2 hours to complete their exam. Failure to meet the deadline means failure on the exam.

The exam consists of three sections. One question must be answered from each section. No answer can be longer than 1,700 words. Answers must be the student's own, and students are urged to take special care to avoid suspicion of plagiarism. All quotes, paraphrases, and copied material (charts, tables, etc.) must be accompanied with full references. Answers should be doubled-spaced; students must save copies of their answers in PDF for future production as the DGS may request.

Answer one question from Sections I, II, and III.

I. Philosophy of Law and Constitutional Interpretation

Question A:

Compare and critically assess the thought of Thomas Aquinas and H. L. A. Hart on *either* (a) the relationship between law and morality, *or* (b) the existence and function of natural law.

Question B:

Craft an essay discussing the "New Originalism." Your essay should address the following questions and issues:

- What is the "New Originalism"?
- Contrast the "New Originalism" with the "old" originalism(s).
- What concerns and arguments have animated and inspired the development of the "New Originalism"?
- Does the "New Originalism" produce different outcomes in concrete cases or specific issues of constitutional law? If so, give examples.
- Does the "New Originalism" respond adequately to the well-known objections that were and are lodged against the "old" originalism(s)?

Question C:

In her 2010 confirmation hearing Elena Kagan said, "We are all originalists." If she was right, originalism comes in different varieties. One variety would be that practiced by Justices Scalia and Rehnquist; another would be that practiced by Justice Kennedy. Call the former "concrete originalism" and the latter "abstract originalism." Contrast these two originalisms in terms of (1) their different theories of language meaning, (2) their different metaethics; and (3) their different methods for finding constitutional meaning.

II. American Constitutional Law and Judicial Politics

Question A:

If the Supreme Court should overrule *Planned Parenthood v. Casey* and *Roe v. Wade*, how can it avoid weakening the doctrinal foundations of (1) *Meyer v. Nebraska*, (2) *Pierce v. Society of Sisters*, and (3) *Everson v. Board of Education*?

Question B:

Alexander Bickel famously argued that the judiciary's power to declare laws unconstitutional creates a "countermajoritarian difficulty." In Bickel's words, "The root difficulty is that judicial review is a countermajoritarian force in our system" because it necessarily "thwarts the will of representatives of the actual people of the here and now." Over the last 65 years, political scientists have subjected this empirical claim to rigorous examination. Summarize the systematic empirical evidence for and against Bickel's claim. Based on the available evidence, was his claim accurate?

Question C:

For its jurisprudence concerning the right to privacy, affirmative action, *or* the Free Exercise Clause, answer the following questions:

- A) Has the Supreme Court articulated a clear and consistent doctrine?
- B) To what extent does that doctrine(s) reflect the actual text of the Constitution?
- C) Explain why we might (or might not) expect a major change in doctrine in the next five years?

III. Comparative Constitutional Systems and Law

Question A:

In Islamic law states, constitutions express a specific relationship between the religious and the secular. Policymakers may be required to take holy oaths, sharia may be officially positioned as the main source of law, or a main source of legislation, etc. Elaborate on the relationship between law and religion in the context of Islamic constitutionalism, referring to specific constitutions. Use examples where religious precepts constitute a small fraction of the legal systems, as well as examples where Islamic law overshadows the majority of domestic laws.

Question B:

Islamic doctrine of constitutionalism embraces a specific understanding of sovereignty. Frequently, constitutions of Islamic law states contain provisions that flow from this doctrine: provisions regarding territory, protection of the environment, or the umma/Islamic community. This conception of sovereignty contrasts with the way that Western legal traditions see human dominion over peoples, land and property. Contrasting the Western and Islamic notions of sovereignty, elaborate on the latter, providing examples from modern constitutions of Islamic law states.

Saturday, January 21, 2023

Constitutional Studies – Comprehensive Exam Questions:

Answer one question from each of the (three) respective sections:

I. Philosophy of Law and Constitutional Interpretation:

1. How does Thomas Aquinas investigate and describe the best regime or constitution in the *Summa Theologiae*? Compare Aquinas's understanding of the best regime with that of Aristotle in the *Politics*, as you interpret it, and that of Publius in the *Federalist Papers*.
2. In his recent book *Common Good Constitutionalism*, Harvard Law professor Adrian Vermeule argues that “Originalism” is ultimately an incoherent approach to constitutional interpretation because it must always rely upon philosophical principles that appeal beyond specifically defined historical understandings. Present this argument in your own words and offer one or several supporting examples, and then respond to the charge from the perspective of an “Originalist” (specifying the originalist approach which you will represent). Evaluate the respective positions for their strengths and weaknesses.
3. “In *Dobbs*, Justice Alito says that the word ‘liberty’ provides ‘insufficient guidance’ and that courts should therefore turn to historical sources to determine whether *Roe* was rightly decided. Alito's position is deeply paradoxical because his approach implies a metaethics contrary not only to constitutional language but also to all traditional authorities, from the founding generation to every subsequent generation of ordinary Americans.” Explain this statement to a college sophomore who has yet to learn the meaning of “metaethics.” Tell this student what metaethics the speaker imputes to (a) Alito and (b) “all traditional authorities.”

II. American Constitutional Law and Judicial Politics:

1. In *Federalist 78*, Publius contends “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” Craft an essay that evaluates Publius’s claim. In your essay, refer to at least one subject area of Supreme Court cases (e.g. speech, press, privacy, equal protection) as well as relevant the relevant secondary literature to substantiate your answer.
2. Can courts influence social change in the United States? In your response, be sure to consider both the propensity of judges to initiate social change and the likelihood that they will succeed in securing social change. An ideal answer should offer evidence relating to specific examples and broad patterns of behavior to support your argument.

III. Comparative Constitutional Systems:

1. In a 2005 conversation, Justices Scalia and Breyer debated the role of foreign law in constitutional interpretation. A separate but equally important question is the role of foreign law in constitution-making. What ought to be the purpose of consulting other countries' experiences in adopting a new constitution and what are potential limitations? Put differently, when is consultation of foreign sources most and least useful? What specific factors ought constitution-makers to consider when consulting foreign sources?

In your answer, note a larger underlying consideration about the universality or particularity of constitutional commitments. For example, national constitutions often employ similar language about the freedom of expression, due process of law, equal protection. Are these cognate commitments essentially the same? (How) do we still find important differences across jurisdictions? In your answer, consider focusing on specific constitutional commitments, such as those mentioned above, to ensure your answer is concrete. Be specific and cite relevant literature.

2. Different constitutional systems embody a variety of institutional arrangements for the exercise of constitutional judicial review. In the 20th century the majority of European constitutional systems opted for a model that varies considerably from that of the United States. Describe the most important differences between the (quasi-Kelsenian) continental European approach and that of the United States, with reference to at least two different European constitutional systems. Explain why the European systems chose to diverge from U.S. constitutional models. And most importantly, analyze and evaluate how the differences between the U.S. tradition of judicial review and the dominant continental European approaches to judicial review reflect underlying differences of understandings and attitudes regarding the relationship between judicial power and democratic self-government.
3. Domestic legal traditions - civil, common, and Islamic - embrace divergent approaches to law and law-making. Some principles inherent to each of these legal traditions are enshrined in constitutions. Explain two major, systemic differences among these legal traditions. Next, choose two constitutions representative of a particular legal tradition and elaborate on constitutional provisions that exemplify the link between a constitution and a legal tradition.

Tuesday, May 23, 2023

Instructions

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Answer one question for Sections I, II, and III.

I. American Constitutionalism and American Political Development:

1. To what extent is the American Founders' Constitution based on self-interest? To what extent does it rely on virtue? How have subsequent consequential political actors (e.g. Lincoln, Wilson, FDR, King) and/or constitutional reforms increased and/or decreased reliance on self-interest and/or virtue?
2. Has the American Supreme Court articulated a clear, consistent, and coherent Establishment Clause jurisprudence? Your answer should include a discussion of at least four First Amendment Religious Clause cases.
3. It has been claimed by some that the American tradition is traceable to developments in British political theory, specifically, the British liberal tradition; and, alternatively, departures from the American political tradition are due to adaptations of German political thought. What are the substance and underlying purpose of these claims, and are they justified? Is there distinctively American constitutional tradition that does not owe its origins or basis to European political thought, or is American constitutionalism in essence a debate that is not essentially American at all?

II. Philosophy of Law and Constitutional Interpretation

1. What, according to H. L. A. Hart, is the best available "concept of law"? How does Hart develop his legal theory in dialogue with earlier philosophers of law? Would you classify Hart's theory as "positivist"? Why or why not? What are Hart's legal theory's greatest strengths and weaknesses, in your view?

2. What is the “New Originalism?” How is it different from older versions of originalism? In your answer, use specific historical or hypothetical constitutional law cases to illustrate the differences between the “new originalism” and older version of originalism.
3. Constitutional theorists have long worried about the countermajoritarian difficulty that courts seem to pose for democracy. How is this difficulty reflected in more recent conversations about legal versus political constitutionalism? What are some institutional innovations that scholars and practitioners have advocated in order to bridge this gap? Draw from two concrete cases to assess these newer models and develop an argument about how likely you think they are to succeed.

III. International and Comparative Law

1. In the context of the secular law/religious law nexus, constitutions of Islamic law states fall alongside a spectrum. Some of them - such as the Kingdom of Saudi Arabia's Basic Law of Governance, or the Iranian Constitution - feature Islamic law as a prominent source of legal obligations. Others, including the Indonesian Constitution are largely secular, though Islamic law's position in the legal system may be delegated to subnational territorial units. Elaborate on the relationship between secular law and religious-based law in Islamic law states, providing examples from the constitutions as well as the sub-constitutional legal systems.
2. What are the benefits and limitations of consulting other countries' experiences in adopting a new constitution? For example, different national constitutions employ similar language about the freedom of expression, due process of law, equal protection. Are these cognate commitments essentially the same? Do we still find important differences across jurisdictions? In your answer, you might also address the tension between the universal and the particular in constitution-making. Focus your answer on specific cases and principles, such as those mentioned above, to ensure your response is sufficiently concrete.

Constitutional Studies Subfield Examination
Department of Political Science
University of Notre Dame

September 2023

The Constitutional Studies comprehensive examination is an open-book (no internet access allowed), written exam to be completed and submitted no later than 6 hours after the exam is distributed. The 6-hour limit is firm, with exceptions at the discretion of the Director of Graduate Studies for physically or linguistically handicapped students and documented events of an extraordinary nature, not including equipment problems for which the student is presumed responsible. Failure to meet the deadline means failure on the exam.

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Answer one question from each section.

I. Philosophy of Law and Constitutional Interpretation

1. Compare Aquinas, Hart, and Finnis on the "essence" or "concept" of law. Which theorist has the best account (among these three) of law, in your view, and why?
2. Write an essay on Aquinas's theory of "human law, addressing human law in itself and its proper scope and power; the circumstances in which human law ought to be changed; and how human law relates to natural law, conscience, and virtue and vice in Aquinas's view.
3. In the 1970s and 80s, Robert Bork, Edwin Meese, and other conservative constitutionalist charged that in decisions like *Roe v. Wade*, liberal justices of the Warren and Burger Courts were going outside the Constitution to impose their values on the rest of the country. To curb what they saw as judicial policy-making, Bork, Meese, and others proposed an originalist approach to constitutional interpretation. Since then, originalism has evolved into several variants. Today, some self-styled originalists (e.g., Jack Balkin, a "living originalist") support a right to abortion, and others (e.g., William Baud, an "inclusive originalist") support a right to same-sex marriage. In an essay of two parts, describe (1) the semantic considerations (regarding word meaning) and (2) the political-moral considerations that account for the variety of originalisms.

II. American Constitutional Law and Judicial Politics

1. Numerous empirical studies of American judicial politics agree that U.S. Supreme Court justices are constrained in their decision making by the preferences of external actors (e.g., the public, Congress, or the president). However, these studies differ with regard to how and why the justices are susceptible to external influence. Describe at least three explanations for how and why Supreme Court justices are influenced by external actors, evaluate the evidence supporting/contradicting each explanation, and make

an argument for which explanation is most persuasive. You may focus on the influence of public opinion, other elected officials, or both.

2. It has been said that, “American is a constitutional republic, not a democratic republic.” Composes an essay that discusses this quotation in light of at least one of the following: (1) the arguments of *The Federalist Papers*, (2) Lincoln’s political thought, (3) an area of United States Supreme Court jurisprudence since 1932.

III. Comparative Constitutional Systems and Law

1. Sources of substantive as well as procedural law differ greatly across domestic legal traditions. First, elaborate on the main sources of law in the Islamic legal tradition. Secondly, explain the nexus between secular law and religious law in the context of modern Islamic constitutionalism drawing examples from at least three contemporary Islamic law states.

2. Family law constitutes the core of the modern Islamic legal tradition as practiced in Islamic law states. Elaborate on two chosen aspects of Islamic family law as expressed in constitutions and sub-constitutional legal systems contrasting the more conservative and progressive approaches. How do women's rights factor into modern Islamic family law?